IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04-03-2005

CORAM :

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

C.R.P. (PD) No. 2802 of 2003
and
C.M.P. No. 21239 of 2003
-o-

M. George ... Petitioner
(2nd Defendant)

Versus

1. M. Albert
2. M. Vijayachandra
3. Mrs. Shanthakumari
4. J. Saravana Rajan
5. J. Suresh
6. J. Naresh
7. Andrew Raj
8. A. Rebucca Swarna
9. Dorathi Nova ... Respondents
(Plaintiff-Defendants 3,5,8 and Pro-Defendnts 9-11.)

Revision under Article 227 of The Constitution of India against the order dated 19-11-2003 made in I.A. No. 1039 of 2003 in O.S. No. 249 of 1996 on the file of the Subordinate Court, Ootacamund.

For Petitioner : Mr. Srinath Sridevan

For Respondent : Mr. Lenin for R1
Mr. Sivakumar for R2
No appearance for RR7 to 9
NDW for RR3 to 6.

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ORDER

The second defendant in O.S. No. 249 of 1996 on the file of the Sub-court, Ootacamund is the revision petitioner herein. The first respondent herein has filed the above said O.S. No. 249 of 1996.

2. In the said suit, the fourth defendant, who is the sister of the first respondent herein as well as the revision petitioner was set exparte on 19-11-1992. Thereafter, the fourth defendant died on 04-09-1996, hence the plaintiff/first respondent herein has filed I.A. No. 1039 of 2003 to implead the legal heirs of the deceased fourth defendant as defendants 9 to 11 in the suit. The trial court, after hearing both sides allowed the said application, hence this revision petition.

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3. Mr. Srinath Sridevan, learned counsel appearing for the petitioner submits that the trial court failed to note that the suit as against the fourth defendant abates and as such the trial Court ought not to have permitted to implead the legal heirs of the deceased fourth defendant in the absence of an application under Order 22 Rule 4 CPC and prayed for setting aside the impugned order of the trial court.

4. For the sake of convenience, the parties are referred to as arrayed by the Court below. Before the court below, the fourth defendant was set exparte on 19-11-1992 since she did not appear even after receipt of summons from the court below. Issues were framed on 14-02-1997. Subsequently, the first defendant died, his legal heirs were impleaded as defendants 5 to 8 in the suit and necessary amendments were also carried out in the plaint. On 10-04-2000, the case was listed for hearing and at the request of the plaintiff it was adjourned for three times. On 04-09-2000, the plaintiff filed an application for adjournment, which was dismissed and the suit was also dismissed for default. The plaintiff filed I.A. No. 1517 of 2000 for restoration of the suit on 29-09-2000 in which the name of the fourth defendant was also shown. The notice sent in the said interloctuary application to the fourth defendant was returned with an endorsement that the fourth defendant died, which reached the Court on 01-12-2000. The plaintiff failed to take steps to bring the legal heirs of the deceased fourth defendant in spite of several adjournments. The said I.A. No. 1517 of 2000 was allowed and the suit was restored as against the other defendants except fourth defendant. The court below pointed out that there is no abatement order was passed in so far as the fourth defendant is concerned.

5. The trial of the suit was over on 19-09-2003, arguments were heard on 22-09-2003 and the suit was posted for judgment on 29-09-2003. At that time, the plaintiff has filed I.A. No. 1039 of 2003 to implead the legal heirs of the deceased fourth defendant as defendants 9 to 11 in the suit. The argument of the plaintiff before the trial court was that no abatement order as against the fourth defendant has been passed or the death of the fourth defendant was informed to the Court, hence the implead petition under Order I Rule 10 is maintainable, though it is filed belatedly.

6. The trial court held that the suit for partition cannot be dismissed on technical grounds for non-joinder of necessary parties. If the non-joinder is found by the Court or brought to its notice, it can implead necessary parties instead of dismissing the suit by invoking Order I Rule 10 (2) CPC. In support of this contention, the trial court relied on the decision of the Honourable Supreme Court reported in (Bhagwan Swaroop and others vs. Mool Chand and others) AIR 1983 SC 355 and allowed the implead petition filed under Order I Rule 10 on 19-04-2003.

7. Now we look into the provisions of Order I Rule 10 CPC, which runs as follows:-

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"10. Suit in name of wrong plaintiff- (1) Where a suit has been instituted in the name of

the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties. - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined; whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended:- Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877) Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

8. All persons interested in the property are necessary parties to a suit for partition. In a partition suit, co-sharers, whether arrayed as plaintiff or defendant is substantially the plaintiff in the suit and he is entitled to a decree for partition of his share. The question of impleadment of a party is to be decided on the touchstone of Order I Rule 10 CPC, which provides that only a necessary or proper party may be added. Mere interest of the party in the fruits of litigation cannot be a true test for his being impleaded as a party. The object of the rule is not to change the scope or character of the suit by adding parties and to enable them to litigate their own independent claim but simply to hold them to avoid unnecessary litigation which might otherwise becomes necessary.

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9. The argument of the learned counsel for the revision petitioner is that when there is a substantial provision available

under Order 22 Rule 4 CPC, resort to the general provisions like Order I Rule 10 CPC may not be permitted.

10. In a suit for partition, the possession of plaintiff and defendant can be interchangeable. It is that each adopts the same possession which the other parties. In this context, it is relevant to look into the decision of the Honourable Supreme Court reported in (Bhagwan Swaroop and others vs. Mool Chand and others) AIR 1983 SC 355 wherein it was held in para-4 thus:-

> "4. ....There is some force in the contention that when a specific provision is made as provided in Order 22 Rule 4, a resort to the general provision like Order 1 Rule 10 may not be appropriate. But the laws of procedure are devised for advancing justice and not impeding the same. In Sangram Singh v. Election Tribunal, Kotah (1955) 2 SCR 1; (AIR 1955 SC 425), this Court observed that a code of procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. This was reaffirmed in Kalipada Das v. Bimal Krishna Sen, (1983) 1 SCC 14.

11. In the decision reported in (Zahirul Islam Vs. Mohd. Usman and others) 2003 1 CTC 184 it was held in para Nos. 6 and 7 thus:-

> "6. A perusal of sub-rule (4), extracted above, shows that a plaintiff may be exempted from the necessity of substituting the legal representatives of a defendant who has failed to file a written statement or who, having filed it, failed to appear and contest the suit at the hearing and that, in such a case, the judgment may be pronounced against the said defendant notwithstanding the death of such defendant and it shall have the same force and effect as if the judgment has been pronounced before the death took place.
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> 7. In the instant case, it is stated by the learned counsel appearing for the appellant that no permission contemplated under sub-rule (4) was obtained from the court exempting the plaintiff from bringing on record the legal representative of the deceased Defendant 2. From the order under challenge also, it does not appear that any such permission was sought or granted by the court. In this view of the matter, the order under challenge cannot be sustained. It is, accordingly, set aside. The appellant was, therefore, entitled to be brought on record in the suit.

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12. The above two judgments of the Honourable Supreme Court guide us that Civil Procedure Code is designed to facilitate justice and to further its ends and not a penal enactment for punishment and penalties.

13. Following the said judgments, the order passed by the Court below is confirmed. The Civil Revision Petition is dismissed. Taking into consideration of the delay caused by the plaintiff, who is the first respondent in this revision in bringing on record the legal heirs of the deceased fourth defendant, in order to meet the ends of justice, a costs of Rs.1,000/- is ordered payable by the plaintiff to the second defendant within a period of four weeks from the date of receipt of a copy of this order. Consequently, connected CMP is closed.

rsh

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The Subordinate Judge
Sub-Court, Ootacamund

+ One cc to M/s Lenin and Bhagya, Advocates (SR No. 10260)

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